



DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[CIS No. 2702-21; DHS Docket No. USCIS-2021-0022]

Remote Document Examination for Form I-9, Employment Eligibility Verification: Request for Public Input

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Request for public input.

SUMMARY: The Department of Homeland Security (DHS) is seeking input from the public regarding document examination practices associated with the Form I-9, *Employment Eligibility Verification*. DHS solicits this input to better understand employers' and employees' experiences with this process and to examine the impacts of remote document examination conducted during the Coronavirus disease (COVID-19) pandemic. DHS especially seeks to understand the potential costs and benefits of allowing for future remote document examination flexibilities.

DATES: Written comments are requested on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Late-filed comments will be considered to the extent practicable.

ADDRESSES: You may submit comments, identified by docket number USCIS-2021-0022, through the *Federal eRulemaking Portal*: <http://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted in a manner other than the one listed above, including emails or letters sent to DHS or USCIS officials, may not be reviewed by DHS in connection with this notice. Please note that DHS and USCIS cannot accept any comments that are hand delivered or couriered. In addition, USCIS cannot accept comments contained on any

form of digital media storage devices, such as CDs/DVDs and USB drives. USCIS is not accepting mailed comments at this time. If you cannot submit your comment by using <http://www.regulations.gov>, please contact Samantha Deshommes, Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by telephone at 240-721-3000 for alternate submission instructions.

FOR FURTHER INFORMATION CONTACT:

Oscar Lujan, Associate Chief for Policy and Guidance, Verification Division, Immigration Records and Identity Services Directorate, U.S. Citizenship and Immigration Services, DHS, 5900 Capital Gateway Drive, Camp Springs, MD 20746; telephone 240-721-3000 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1-877-889-5627 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. Public Participation

Interested persons are invited to comment on this notice by submitting written data, views, or arguments using the method identified in the **ADDRESSES** section.

Instructions: All submissions must include the docket number for this notice. Comments received may be posted without change to <http://www.regulations.gov> including any personal information provided.

Docket: For access to the docket to read background documents or comments, go to <http://www.regulations.gov>.

II. Background

For over three decades, federal law has required that every employer must attest on a form established by regulation that it has verified that the employee is authorized for

employment in the United States.¹ The Form I-9 is used to verify the employee's identity and employment eligibility as required by 8 U.S.C. 1324a(b), which calls for the employer to "examin[e]" documentation provided by the individual and then, if the documentation reasonably appears on its face to be genuine, attest that "it has verified that the individual is not an unauthorized alien by examining the document[ation]" provided. 8 CFR 274a.2(b)(1)(ii)(A) requires that every employer "[p]hysically examine" and then attest that the documents appear to be genuine and to relate to the person presenting them. If an employee presents a document that does not reasonably appear to be genuine or to relate to him or her, the employer must reject that document and may ask the employee to present other acceptable documents that satisfy the requirements of Form I-9.

COVID-19 was declared a National Emergency on March 13, 2020, and on March 20, 2020, DHS announced² that it would defer the physical presence requirements associated with Form I-9. DHS permitted employers with employees taking physical proximity precautions due to COVID-19 to examine their employees' identity and employment eligibility documents remotely (for example, over video link, fax, or email, etc.). Then, within three business days after the termination of the National Emergency, DHS would require employers to obtain, inspect, and retain copies of the documents and enter "COVID-19" in Section 2 as the reason for the physical inspection delay. Prior to April 1, 2021, these flexibilities only applied to employers and workplaces operating exclusively remotely. If employees were physically present at a work location, DHS offered no exception to the in-person verification of identity and employment eligibility documentation. These flexibilities were initially allowed for a period of 60 days and were subsequently extended several times.

¹ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, Part A, 101 (Nov. 6, 1986), codified at 8 U.S.C. 1324a(b), 8 CFR 274a.2(b)(1)

² U.S. Immigration and Customs Enforcement, "DHS announces flexibility in requirements related to Form I-9 compliance," <https://www.ice.gov/news/releases/dhs-announces-flexibility-requirements-related-form-i-9-compliance> (last visited Sept. 24, 2021).

DHS then issued guidance on March 31, 2021,³ that specified: a) the requirement that employers inspect employees' Form I-9 identity and employment eligibility documentation in-person applies only to those employees who physically report to work at a company location on any regular, consistent, or predictable basis; b) employees hired on or after April 1, 2021, who work exclusively in a remote setting due to COVID-19-related precautions, are temporarily exempt from the physical inspection requirements until they undertake non-remote employment on a regular, consistent, or predictable basis, or the extension of the flexibilities related to such requirements is terminated, whichever is earlier; and c) the flexibilities do not preclude employers from commencing, in their discretion, the in-person verification of identity and employment eligibility documentation for employees who were hired on or after March 20, 2020, and presented such documents for remote inspection in reliance on the flexibilities first announced in March 2020.

On August 31, 2021, DHS announced that the document examination flexibilities established on March 20, 2020, were extended until December 31, 2021.⁴

III. Request for Input

A. Importance of Public Input

DHS is now seeking to explore alternative options to physical document examination that offer an equivalent or higher level of security for identity and employment eligibility verification purposes.⁵ Members of the public may have unique insight about ways employers may conduct remote document examination related to the Form I-9. DHS is interested in obtaining input from

³ U.S. Immigration and Customs Enforcement, "DHS announces flexibility in requirements related to Form I-9 compliance," <https://www.ice.gov/news/releases/dhs-announces-flexibility-requirements-related-form-i-9-compliance> (last visited Sept. 24, 2021).

⁴ U.S. Immigration and Customs Enforcement, "ICE announces extension to new employee guidance to I-9 compliance flexibility," <https://www.ice.gov/news/releases/ice-announces-extension-new-employee-guidance-i-9-compliance-flexibility-1> (last visited Sept. 24, 2021).

⁵ Form I-9 related provisions and requirements are found in the Immigration Reform and Control Act of 1986, codified at sections 274A (8 U.S.C. 1324a), 274B (8 U.S.C. 1324b) and 274C (8 U.S.C. 1324c) of the Immigration and Nationality Act (INA), as well as in implementing regulations and guidance at 8 CFR 270, 274a, 8 CFR Parts 44 and 68, and in the Handbook for Employers (M-274) <https://www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274>.

the public about its experiences with remote document examination that can be used to inform and improve DHS policies and processes.

B. Maximizing the Value of Public Input

This notice contains a list of questions, the answers to which will assist DHS in identifying processes that may reduce burdens on the public, save costs and/or time, and/or improve efficiency. DHS encourages public comment on these questions and seeks any other information or data commenters believe are relevant to this request.

DHS particularly encourages comments from employers, as well as employer organizations such as trade groups or associations, employment recruitment and referral organizations, organizations specializing in employee onboarding, employees, researchers and policy experts, and other members of the public. DHS also encourages comments from small businesses, small nonprofits, and small governmental jurisdictions with a population of fewer than 50,000.

DHS is interested in responses to the specific questions below, as well as the general concepts and topics identified. DHS is particularly interested in responses describing employees' and employers' specific experiences and input related to document examination practices. To better categorize responses, DHS encourages respondents to identify their role in the employment eligibility process (for example, employer, employer association, employee), and if the respondent is an employer, to indicate its approximate organization size by number of employees, industry type, and whether the employer is currently enrolled in E-Verify.

C. List of Questions for Commenters

The following non-exhaustive list of questions is meant to assist commenters in formulating comments, and is not intended to restrict the feedback that commenters may provide:

Experiences with Pandemic-Related Document Examination Flexibilities

1. Did you or your organization use the flexibilities for remote document examination for the Form I-9 since March 20, 2020? If not, why? If so, what was your experience using the flexibilities? How did small employers use these flexibilities?

2. If the employer performed any remote document examinations since March 20, 2020:

a. What were your experiences with internal technical capabilities to perform remote document examination (for example, video quality, image quality, document retention, etc.)?

b. What were your experiences related to employee-provided digital images or copies of documents for retention?

c. What were your experiences related to employees' remote completion and submission of Section 1 of the Form I-9?

d. What processes and/or technology solutions were typically used to remotely examine documents (for example, over video link, fax, or email, etc.)? Was the process always the same, or did it vary based on circumstances? What, if any, internal policies were put into place related to remote document examination practices?

e. Were any remotely examined documents rejected because they did not relate to the individual presenting them or did not appear to be genuine? Were there any instances in which a document was accepted during remote examination, but upon subsequent physical inspection, the employer determined that the document did not appear to be genuine or did not relate to the individual presenting it? If so, what actions did the employer take?

3. If the employer performed any remote document examinations since March 20, 2020, **and** is enrolled in E-Verify:

a. Were any documents examined remotely for which E-Verify returned an Employment Authorized result, but upon subsequent physical examination, the employer determined that the documents did not appear to be genuine or relate to the individual presenting them? If so, what actions did the employer take?

b. What, if any, challenges did employers experience in interpreting and following the requirements of participation in the E-Verify program⁶ during the period of remote document examination?

4. What other changes did employers make to Form I-9 document inspection procedures during the pandemic? Did employers increase use of authorized representatives?

Considerations for Future Remote Document Examination Procedures

1. What are the direct and indirect burdens on employees and employers related to the physical document examination requirement for Form I-9?

2. What are the direct and indirect burdens on employees and employers related to the use of authorized representatives to meet the physical document examination requirement?

3. What would be the direct and indirect benefits of offering a permanent option for remote document examination of Form I-9 identity and work eligibility documents (for example, allowing some employers to centralize Form I-9 processing)?

4. What would be the direct and indirect costs of offering a permanent option for remote document examination of Form I-9 identity and work eligibility documents (for example, training or technology acquisition costs)?

5. What would be the direct and indirect burdens on small employers for the items listed above? What are the unique challenges faced by small employers with this process and these flexibilities? What kinds of alternatives should be provided for small employers in adopting these flexibilities?

6. If employers were allowed a permanent option for remote document examination, what types of employers and/or employees do you anticipate would be interested in participating or not interested in participating?

⁶ E-Verify Memorandum of Understanding: <https://www.e-verify.gov/sites/default/files/everify/memos/MOUforEVerifyEmployer.pdf>

7. How might participation requirements as a condition of these flexibilities, such as required enrollment in E-Verify, document or image quality or retention requirements, or required completion of training offered by DHS, impact an employer's desire or ability to utilize such a flexibility?

8. What would be the costs or benefits associated with making enrollment in E-Verify a condition of flexibilities for you, as an employer?

9. If DHS were to permanently allow an option for remote document examination, what technical considerations would participating employers have to consider?

10. What impact would a permanent option for remote document examination have on employees and employers, if any? If these flexibilities are adopted, are there requirements DHS should adopt to ensure employee rights related to document examination are protected?

11. Are there solutions that would enable employers to verify that documents that are examined remotely appear to be genuine and to relate to the individual presenting them? What actions by DHS would encourage the commercial development of such solutions?

12. Should DHS consider changes to the current lists of acceptable documents on the Form I-9, in the context of remote document examination? What would be the costs and benefits of such changes?

13. Are there any other factors DHS should consider related to remote document examination?

IV. Review of Public Input

This notice is issued solely for information and program-planning purposes. Public input provided in response to this notice does not bind DHS to any further actions, to include publishing a formal response or agreement to initiate a recommended change. DHS will consider the feedback and make changes or process improvements at its sole discretion. Commenting on this notice is not a substitute for commenting on other ongoing DHS rulemaking efforts. To be considered as part of a specific rulemaking effort, comments on DHS rules must be received

during the comment period identified in the relevant rulemaking published in the *Federal Register*, and in the manner specified therein.

Ur M. Jaddou,

Director, U.S. Citizenship and Immigration Services,

Department of Homeland Security.

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